In the Supreme Court of the United States

OCTOBER TERM, 1948.

Office Supreme Court
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CHARLES ELMORE

No. 549 and 550

CARY R. ALBURN, Trustee under the Last Will and Testament of Charles H. Salmons, Deceased, et al.,

Petitioners,

vs.

THE UNION TRUST COMPANY, East 9th Street and Euclid Avenue, Cleveland, Ohio, et al.,

Respondents.

No. 549.

CARY R. ALBURN, Trustee under the Last Will and Testament of Charles H. Salmons, Deceased, et al.,

Petitioners,

vs.

THE NATIONAL CITY BANK OF CLEVELAND, Successor Trustee under the Agreement and Declaration of Trust dated August 15, 1924, etc., et al.,

Respondents.

No. 550.

REPLY BRIEF OF PETITIONERS.

PAUL R. HARMEL,
1070 Union Commerce Building,
Cleveland 14, Ohio,

WILLIAM S. EVATT,
50 West Broad Street,
Columbus 15, Ohio,

CARY R. ALBURN,
Hippodrome Building,
Cleveland 14, Ohio,

Attorneys for Petitioners, Cary R. Alburn, etc., et al.

Of Counsel:

SAMUEL HORWITZ,
STANLEY I. ADELSTEIN.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 8547

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RESPONDENTS' BRIEFS.

The brief of the Attorney General of Ohio concludes with this statement:

> "We think valid reasons have been presented to this court for the exercise of its jurisdiction." (Atty. Gen.-11.)

In view of this statement the assertion of Union Properties, "There is no suggestion in the Attorney General's brief that any Federal question is here presented" (UP-16-17) is obviously incorrect. We believe the position of the Attorney General of the State of Ohio is particularly significant because he, as counsel for the Superintendent of Banks, and as a public official, is the only participant with

no pecuniary interest in the controversy. It is to be noted that the Attorney General is now handling these cases entirely in his own office in the State House; too often in the past the Superintendent of Banks has been represented by Special Counsel who simultaneously have acted on behalf of Union Properties, Inc. which, by reason of its private interests, has not occupied the disinterested position required of a public official.

The answer briefs of the three other respondents[1] are based upon common arguments and to conserve the time of the Court, petitioners will reply to them in this single brief.

FACTS OUTSIDE THE RECORD.

The facts to be considered are only those appearing in petitioners' pleadings to which the respondents' demurrers were sustained. Respondents have alleged many facts to which no references to the Record are made, which are outside the Record and which have no pertinency to the Federal questions involved. To respond to them would not only consume the time of this Court but would divert it from the real issues. Suffice it to say here that The Union Trust Company not only realized a profit in excess of $1,695,000.00 and the other profits alleged in the petition and cross-petition (QTR-28, DJR-27) but received an additional $1,000,000.00 (with a profit of more than $300,000.00) in a separate sale of the building, which one of the respondents implies went along gratuitously with the sale of the land to the Trust (UP-8). Almost all of the 200 beneficiaries of this Trust, many of whom reside outside of Ohio, never had any knowledge of the facts nor any choice to assert their rights until 1942 when the *Hart* case was filed; whereas a selected handful of beneficiaries, including members of the Burdick group, were given full in-

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[1] References to respondents' briefs are abbreviated as follows: Attorney General of Ohio, Atty. Gen.; National City Bank, Successor Trustee, NC; Union Properties, Inc., UP; and Harold B. Burdick, *et al.*, Burdick.

formation at an early date on the basis of which they made individual settlements with the Superintendent of Banks.

RESPONDENTS' CONTENTION WITH RESPECT TO THE STRIKING OF THE PETITIONERS' ANSWER IN THE QUIET TITLE SUIT.

Respondents' justification of the striking of petitioners' general denial to the quiet title petition of the Successor Trustee is that the general denial did not constitute a cause of action, was therefore demurrable (by way of motion to strike) and that an adequate hearing was given in permitting petitioners to file briefs and make oral arguments (UP-3-6, 12; NC-6-7, 11-14; Burdick-9). This argument is epitomized in National City's statement:

> "Their general denial of the allegations of the petition states no cause of action giving rise to a remedy." (NC-13.)

Union Properties offers the same argument more subtly phrased.[2]

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[2] On page 3 of its answer brief Union Properties says:

> "Petitioners' case rests upon the proposition that a party, whose pleadings have been found insufficient as a matter of law after a full hearing,—either on demurrer or on motion to strike,—and who was accorded a full opportunity to amend such pleadings, has been denied his day in court. Nothing could be more absurd."

Again, on page 12 of its answer brief, Union Properties states that the petitioners are guilty of

> "the wholly false assumption that a party whose rights are judicated by sustaining a demurrer or motion to strike—thus determining that his pleadings present no cause of action or no defense—has been denied a hearing."

And on page 13, the respondent says:

> "In ruling upon the merits of petitioners' case as presented by their pleadings, the lower courts did exactly what courts do *every day* in ruling upon demurrers or other questions arising upon pleadings."

It is to be noted that nowhere does Union Properties state that the "pleading" to which the motion to strike was addressed, was a *general denial.*

The contention that general denials may be stricken on the ground that they constitute demurrable causes of action, presents a new concept of judicial process which this Court may wish to review, since undoubtedly it has never before been submitted to it for consideration.

A parallel argument is urged by Union Properties with reference to the contention made by the Attorney General that the Ohio courts entirely ignored the issue of invalidity raised by the Superintendent of Banks' general denial to the cross-petition in the quiet title suit (Atty. Gen.-9). Union Properties seeks to justify the action of the Court by stating that the petitioners filed no reply to the general denial of the Superintendent and thus "admitted" the general denial (UP-4, Footnote 1). That a party must deny a general denial to his petition or suffer a dismissal thereof is also a novel concept of judicial process that should be reviewed by this Court in order to determine how many denials of denials are necessary to reach a litigable issue.

Respondents contend that the petitioners were accorded a "full and fair hearing" upon the question as to whether their general denial was demurrable. The permission to file briefs and make oral arguments *ad nauseam* on non-existent, extraneous trumped-up issues, injected to divert attention from and to prevent a hearing upon the real issue in the case, is not the kind of hearing guaranteed by the Fourteenth Amendment. As Mr. Justice Cardozo stated in *Palko vs. Connecticut,* 302 U. S. 319, 327, 82 L. Ed. 288 (1937):

> "The hearing, moreover, must be a real one, not a sham or a pretense."

The hearing guaranteed by the due process clause must be one not only in form, but in substance as well. *Mooney vs. Holohan,* 294 U. S. 103, 79 L. Ed. 791 (1934); *Moore vs. Dempsey,* 261 U. S. 86, 67 L. Ed. 543 (1923).

In the *Brinkerhoff-Faris* case, 281 U. S. 673, 74 L. Ed. 1107 (1930) discussed on page 24 of our original brief, the

Missouri courts went through all of the motions of a complete trial and appeal, but this Court, nevertheless, held that the petitioner was not accorded due process because it was never given the hearing upon the merits, to which it was entitled.

The striking of an answer of general denial and rendition of a default judgment is a violation of due process not only because the defendant is deprived of a hearing, but for another reason to which the respondents have addressed no argument. When the general denial is stricken the court loses jurisdiction to render any judgment against the defendant. As held in *Windsor vs. McVeigh*, 93 U. S. 247, 23 L. Ed. 914 (1876) discussed on page 19 of our original brief, the striking of their answer was in legal effect the recall of the citation and notice to the defendant, created a situation identical to one where the defendant is never notified and never appears, with the result that the judgment is void, not only because the defendant was granted no hearing, but because the court had no jurisdiction over the defendant and, therefore, no power to render judgment affecting his rights. Thus, the decree in the quiet title action purporting to adjudicate the validity of the trust, is void, not only because no hearing was afforded the petitioners, but because, having stricken the answer, the court had no jurisdiction to issue the decree. *A fortiori*, the injunction issued against the defendants after they were expelled from the case, is also void for lack of jurisdiction, and violative of due process.

RESPONDENTS' CONTENTION WITH RESPECT TO PETITIONERS' ARGUMENT THAT BENEFICIARIES HAVE BEEN DEPRIVED OF ALL REMEDIES, LEAVING THEIR PROPERTY RIGHTS INSECURE AND IN PERIL.

Two Federal questions have been presented to this Court. The first, arising from the striking of the general denial, was whether the petitioners' *procedural* rights under the due process clause were denied because they were

deprived of a hearing and because the Court issued a judgment purporting to bind them without having jurisdiction over them. This denial of procedural rights is the subject matter of the cases of *Windsor vs. McVeigh*, 93 U. S. 274, 23 L. Ed. 914 (1876); *Hovey vs. Elliott*, 167 U. S. 409, 42 L. Ed. 215 (1897); *Hansberry vs. Lee*, 311 U. S. 32, 85 L. Ed. 22 (1940); and *Riverside and Dan River Cotton Mills vs. Menefee*, 237 U. S. 189, 59 L. Ed. 910 (1915) discussed on pages 19-21 of our original brief.

The second question presented to the Court results from the persistent refusal of the Ohio courts to determine the validity of this trust and finally enjoining the petitioners from having a judicial determination. By depriving them of any remedy to enforce their right, the Court denied them due process as to a *substantive* right. The denial of a substantive right by depriving a party of his remedy is the subject matter of *Brinkerhoff-Faris Company vs. Hill*, 281 U. S. 673, 74 L. Ed. 1107 (1930), and *Marino vs. Ragen*, 332 U. S. 561, 92 L. Ed. 203 (1947) discussed on pages 24 and 25 of our original brief.

It is difficult to lay a finger on any concrete or specific argument of respondents in answer to this second proposition. Vague assertions are made that issues of the *Cook* and *Hart* cases are being re-litigated without specifying what issues. It is nowhere stated in respondents' briefs that the issue involved in these cases—the issue of the validity of the trust,—was adjudicated in the *Hart* and *Cook* cases. Not only had the lower courts in the declaratory judgment and quiet title actions expressly stated that the validity of the trust was not determined in the *Hart* and *Cook* cases (DJR-70, 71, 87; QTR-77), but the courts in the *Hart* and *Cook* cases expressly so stated. In the *Hart* case, the Supreme Court of Ohio, unable to agree, was equally divided, three voting to uphold the Court of Appeals' judgment and three to reverse it. The Court of Appeals merely held that the certificate holders were barred

from filing claims as general creditors and expressly stated in its journal entry that it was not deciding the issue of validity. In the *Cook* case the Supreme Court held that the remedy of mandamus did not lie because the Superintendent of Banks had no specific statutory duty to bring such a proceeding. The Supreme Court of Ohio in that case made no determination of the issue of invalidity, stating in its opinion:

> "Much of the relators' petition and reply is devoted to the claim that the trust is void. *We do not reach that question in this case.*" 146 O. S. 348, 359.

The statements ot Judge Turner frequently quoted in respondents' briefs were merely the *obiter dicta* of this Judge, not the law of the case, and related only to the rights of certificate holders as creditors. That the *Cook* case did not determine the issue of invalidity is further evidenced in the dissenting opinion of Judges Bell and Matthias, 146 O. S. 387:

> "This case should not be disposed of upon motion. Relators should be granted full opportunity to prove or attempt to prove the facts alleged and the respondent should be given an equal opportunity to prove his side of the controversy so that the court could dispose of the matter upon its merits, particularly in view of the admitted facts that the bank made a profit of over $1,000,000 by the sale of land trust certificates upon land which was its own property previous to the creation of the trust; that from 1924 to 1933 when it resigned as trustee it was enriched to the extent of about $100,000 additional; that it reserved to itself the sum of $10,000 per annum in perpetuity; and that it restricted the use of the Citizens Building located upon the land placed in trust to other than banking purposes for its own further benefit and profit, all of which acts were either expressly or by clear implication condemned in the *Ulmer* case. Therefore, we dissent from the judgment."

On page 384 Judges Bell and Matthias also stated:

"The validity of the trust being the only issue involved here, that question was never passed upon or determined."

In the oral argument before the Ohio Supreme Court in the *Cook* case, counsel for Union Properties, Inc. who was then also counsel for the Superintendent of Banks, engaged in the following colloquy with Judge Bell relative to the fact that the issue of validity was not adjudicated in the *Hart* and *Cook* cases and to the importance of having its adjudicated:

"Judge Bell: Mr. Burns, may I ask you a question?

Mr. Burns: Yes, Judge Bell.

Judge Bell: Suppose your motion for a judgment here is granted, that makes an end of this case, doesn't it?

Mr. Burns: Yes.

Judge Bell: What forum then will the certificate holders ever have to determine the question of whether the trust is valid? You say it is valid, the other side says it is invalid, both sides say that that question has never been litigated.

Mr. Burns: Yes.

Judge Bell: If we end this case here by sustaining this motion, doesn't that deny these certificate holders any forum in which they can ever test this question?

Mr. Burns: Oh, I don't think so at all. I think it can be tried by a quiet title proceeding in Common Pleas Court, any number of ways. The National City Bank as trustee, or if the National City Bank refused, a certificate holder could ask to have it determined. As a matter of fact, before the Hart case was filed, two of the original plaintiffs in that case filed an action for a declaratory judgment in the Common Pleas Court to have it determined whether the trust was valid or invalid and they can still do the same thing."

Contrary to the aforesaid representation to the Supreme Court of Ohio this same respondent promptly filed

a demurrer when the petitioners instituted their declaratory judgment action, and is now contending that the issue was litigated in the *Hart* and *Cook* cases.

It is stated that the records of the *Hart* and *Cook* cases were before the lower courts in the declaratory judgment and quiet title suits. These ambiguous assertions have no foundation in fact nor are they in the Record before this Court. The lower courts did not have before them or consider the records of the previous cases. The records could have been properly presented only under an affirmative plea of *res judicata* which of course was not filed since the cases below were disposed of on demurrers and motions to strike the petitioners' pleadings. If the lower courts *had* rendered their judgments upon the ground that the issue of validity had been adjudicated in the prior cases, the United States Supreme Court would hold that such action was a violation of due process in that the petitioners were not permitted to offer any proof showing that the issue of validity was not determined in the prior cases. *Postal Telegraph Cable Co. vs. City of Newport, Kentucky,* 247 U. S. 464, 475, 476; 62 L. Ed. 1215, 1220, 1221 (1918).

RESPONDENTS' CONTENTIONS WITH RESPECT TO THE NECESSITY FOR A DETERMINATION OF TITLE TO REMEDY BENEFICIARIES' POSITION OF INSECURITY AND PERIL.

The certificate holders *must* have a determination of validity or invalidity because they are the beneficial owners of real estate and the legal owners of land trust certificates whose value and marketability have been seriously affected by the doubt as to their title. They must have a determination before the liquidation of The Union Trust Company is completed, because if not, there may be a declaration of invalidity after all assets are distributed and all hope of recourse gone.

While the Successor Trustee, who has only a nominal interest in the property, may be willing to take the risk,

the petitioners who as beneficiaries are the real parties in interest, are not. The Successor Trustee continues to argue that the quiet title petition did not involve the issue of title, but only a question of income (NC-7, 11). This was in fact the basis of the decision of the Court of Appeals (QTR-77). That Court stated:

> "* * * the declaration of trust of August 15, 1924, gave The Union Trust Company some rights in respect to a part of the income and the quiet title action was brought against the Superintendent of Banks of the State of Ohio, Union Properties, Inc. and The Union Trust Company to quiet any possible claims."

It should be observed that the declaration of trust, a provision of which the Court of Appeals passed upon, was never presented to the courts either in the pleadings or in the evidence (since no evidence was presented) and that therefore the judgment of the Court is void for rendering judgment without proof.

This position of the Successor Trustee and of the Court of Appeals makes it exceedingly difficult, if at all possible, for any interested party, for example one desiring to expend $2,000,000.00 in the purchase of the property, to rely upon the decree quieting title.

The entire proceeding in the quiet title action is so replete with questionable actions of the Court that no one can rely upon the judgment reached as being a legally binding adjudication of anything. The Attorney General of the State of Ohio has pointed out in his brief, for example, that the Court completely ignored the issue of validity raised by his general denial of the allegations of petitioners' cross-petition (Atty. Gen.-9-10). Even the disclaimer of the Superintendent of Banks is of questionable validity, for if the trust were invalid the property is and always has been an asset of the bank and under the banking statutes of Ohio the Superintendent has a mandatory duty to take title and liquidate it (Ohio General Code, Section 710-95-8), and he is specifically enjoined

from abandoning or disclaiming any asset without a special application to the Common Pleas Court, with notice to all interested parties, stockholders, depositors and creditors, who have the right to participate in the hearing and to file a suit to restrain any order of abandonment (General Code of Ohio, Section 710-95-3). The quiet title decree, as has been shown, is void because the petitioners were expelled from the case leaving the Court without jurisdiction to bind them and for the other reasons set forth in our original brief.

Petitioners believe that the insecurity and peril of their position will continue until there is a judicial determination of the validity or invalidity of their title, and because they have been enjoined by the Ohio courts from seeking such a determination they can have relief only by appropriate orders of this Court.

Respectfully submitted,

PAUL R. HARMEL,
WILLIAM S. EVATT,
CARY R. ALBURN,

Attorneys for Petitioners,
Cary R. Alburn, etc., et al.

Of Counsel:

SAMUEL HORWITZ,
STANLEY I. ADELSTEIN.